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No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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Of all the principles competing for acceptance in this case, four stand out after two rounds of briefing:

(1) the natural meaning of "safety regulatory authority of a State," 49 U.S.C. § 14501(c)(2)(A), encompasses the States' "absolute discretion," *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991), to delegate authority to their agencies, cities and other components of state government;

(2) the *Russello* negative inference does not trump this accepted reading (a) because Congress had ample reasons for specifying the roles of "political subdivisions" in other provisions of the 1994 FAAA Act and for not doing so in § 14501(c)(2)(A) and (b) because the animating objective of the provision was not separately to empower States (or cities) in the covered areas but to incorporate and preserve 60 years of *separate* federal legislation on these topics, which contemplate state *and* local regulation;

(3) the authority of the Department of Transportation to preempt local regulations that unduly interfere with interstate commerce confirms that the cooperative federalism embraced by these laws will not impede the wheels of commerce; and

(4) even if doubt lingers about the meaning of the provision, respondents have not overcome the interpretive imperative that whatever power Congress has "to prohibit the delegation of state regulatory authority to municipalities," the cities, States and United States agree that it "'is a power that [the Court] must assume Congress does not exercise lightly,'" and in this case there is no compelling indication that Congress exercised any such power. U.S. 16 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

1. By providing that the preemption provision "shall not restrict" the "safety regulatory authority of a State," § 14501(c)(2)(A) plainly allows States to continue to delegate power to state agencies and municipalities. The tow-truck companies do not dispute that the term "State" by

itself normally encompasses a delegation of state power. Indeed, they acknowledge (Resp. 20) that *Mortier*'s holding on this point is an "unexceptional" one. Nor do they dispute that the reference to "regulatory authority" normally encompasses a delegation of power. Indeed, the other federal laws upon which they rely (*id.* 19-20) all contemplate delegations of power.

Respondents also do not counter the argument of the United States (U.S. 16-20) that the court of appeals' decision fails to respect the first command of § (c)(2)(A)—that "Paragraph (1)," the preemption provision, "shall not restrict" the safety regulatory power of the States. Prior to 1994, Ohio exercised its authority to regulate tow trucks by delegating responsibility to city governments, including the City of Columbus. *See* Ohio Const. art. XVIII, § 3; Ohio Rev. Code §§ 715.22, 723.01. According to respondents, however, the 1994 FAAA Act barred Ohio from continuing to dispense power in this way. That interpretation thus not only overlooks the ordinary meaning conveyed by a preservation of the "regulatory authority" of a "State," but also fails to respect the "shall not restrict" language of the provision.

Under these circumstances, it makes no difference whether the preemption provision is "broad" or "not all-encompassing," as respondents variously argue (Resp. 11). By the statute's explicit terms, the preemption provision "shall not restrict" the "State[s']" safety "regulatory authority"—which is why respondents ultimately turn to context.

2. While the context in which a phrase appears may fortify its traditional meaning, it may not alter that meaning. In the opening briefs, the City showed (Pet. 21-22) that *Russello v. United States*, 464 U.S. 16 (1983), was an interpretive aid of secondary, not first, resort, and the United States showed (U.S. 13-14) that in *Russello* itself the negative inference was used to "fortif[y]," 464 U.S. at 22, not to

overcome, the customary meaning of the terms at issue. While respondents dispute the point, they are unable to identify a single case from this Court in which the accepted meaning of a term was altered by the context in which it appeared or in which the Court *began* its analysis by considering context. Because "the negative pregnant" created by silence in one section of a statute but not another is not an "interpretive trump card," *Field v. Mans*, 516 U.S. 59, 67 (1995), respondents' reliance on *Russello* is unavailing.

3. Congress had ample reasons to specify the role of political subdivisions in some provisions of the 1994 FAAA Act but not in others. Respondents also fail to answer a second reason why *Russello* does not apply here: In drafting the 1994 FAAA Act, Congress had legitimate reasons for specifying the role of "political subdivisions" in some provisions but not in others. Respondents do not dispute this limitation on *Russello* but simply say in two footnotes that it is inapplicable here. They initially claim (Resp. 24 n.14) not to understand why Congress would clarify that the preemption provision applies to ordinances enacted by "political subdivisions." But the existence of a presumption against preemption is exactly why a legislature would use such specificity in the preemption provision. While this backdrop gave Congress a legitimate reason for tying a double rather than a single statutory knot in describing the breadth of preemption, it had no comparable reason for doing the same when it came to preserving a 60-year history of state and local safety regulations. How such safety authority would be implemented had long been, and continued to be, a matter for the States to decide in the first instance. Whether out of respect for a co-equal branch of government and its "well settled" authority to delegate power to its constituent parts, *Mortier*, 501 U.S. at 607-08, or out of concern that specifying a city's power to enact safety regulations could be construed to trump the contrary directives of a State's legislature, Congress ultimately had ample reasons for specifying

"political subdivisions" in the preemption provision but for not doing so in preserving the safety authority of the States.

Also unavailing is respondents' answer to the only other component of the 1994 FAAA Act that specifies political subdivisions—§ (c)(3)(A). There, as the City explained (Pet. 25), Congress named various laws that could be enacted by political subdivisions and States because this subsection was designed to benefit motor carriers, not States or cities. The specificity was needed to ensure that motor carriers could make these various laws applicable to them on a retail (city-by-city) rather than solely on a wholesale (State-by-State) basis. Respondents' acknowledgment (Resp. 28 n.15) of this explanation re-states the point but does not answer it.

Given these legitimate explanations for Congress's word choice, it makes no difference whether one views *Russello* as an interpretive aid of first or secondary resort. For there is no dispute that "the canon . . . is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 122 S. Ct. 1043, 1049 (2002). Here, once it is established that Congress had ample reasons for mentioning "political subdivisions" in some portions of the 1994 Act but not in others, respondents are left only with silence, not a negative pregnant and not negative inferences. And that silence cannot overcome the natural meaning of "safety regulatory authority of a State," which Congress did "not restrict" in the 1994 Act.

4. The City's interpretation does not create impermissible surplusage. In a variation on a theme, respondents separately argue (Resp. 23-26) that the City's reading creates redundancy in the preemption provision. In one respect, they are partially correct. In drafting § (c)(1), Congress was not *required* to specify that in addition to laws enacted by "States," those enacted by "political subdivisions" would be preempted. The preemption of "State" laws

generally will suffice to preempt laws enacted by cities regarding the same subject matter. But the specificity was not practically superfluous. The existence of the presumption against preemption, as well as the decision of at least one lower court, *see Ohio Mfrs. Ass'n v. Akron*, 801 F.2d 824, 828-31 (6th Cir. 1986), provided ample reason to "emphasize" the political bodies covered by § (c)(1). *See United States v. Powell*, 379 U.S. 48, 56 (1964). To be sure, as the Court has remarked in rejecting a similar surplusage argument, the role of the disputed term "may not be very heavy work for the phrase to perform, but a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000).

Respondents' interpretation, at any rate, fails to remove a similar redundancy. If they are correct that the references to "State" and "political subdivisions" in § (c)(1) are redundant, then it is assuredly also true that the references to "State" and "2 or more States" in the same provision are redundant as well. When Congress bars States from doing something singly, it also bars them from doing it collectively. Either way, some redundancy thus is afoot in the statute, and neither proffered reading will cure it. This is simply a situation in which the drafter of the statute chose to emphasize that not just States, but political subdivisions of States and political aggregations of States as well, were prohibited from regulating in this area. Yet in emphasizing the political bodies covered by preemption, the drafter no more altered the customary meaning of "safety regulatory authority of a State" than the author of "Equal Justice Under Law" altered the customary meaning of "justice under law."

5. The broader context in which "safety regulatory authority of a State" appears bolsters this reading. The tow-truck companies' contextual and surplusage arguments not only fail on their own terms but also ignore the broader context in which these terms appear. While arguing that the meaning of "safety regulatory authority of a State" should be

determined in the context of specific mentions of "political subdivisions" in other components of § 14501, they see no relevance to the use of the term "State" in the statutory findings, in pre-existing federal laws regarding "safety," or in the motor carrier laws preserved by § 14501(c)(2)(A). This is not only inconsistent but ignores the more illuminating comparisons.

Respondents and their *amici*, for example, offer no response to the argument (Pet. 28-29) that the congressional findings of the 1994 FAAA Act use "State" to encompass state delegations of power. Recall that those findings, like the legislative history, never mention political subdivisions but provide only that "certain aspects of the *State regulatory process* should be preempted" and that "[t]he *regulation* of intrastate transportation of property by the *States*" has imposed a burden on interstate commerce. FAAA Act, Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis added). Under the tow-truck companies' interpretation, it would follow (implausibly) that the law's purpose has nothing to do with preempting city ordinances regarding prices, routes and services. Context is not a one-way street.

Just as significantly, the lineage of the "safety" provision and the other matters covered in § (c)(2)(A) show that they merely incorporate and preserve 60 years of existing state regulatory authority provided in other provisions of Title 49. *See* Pet. 24; U.S. 16-22. Notably, respondents do not contest this point—which is significant for two reasons.

First, this preservation of pre-existing limitations on state and municipal legislation defeats one of the tow-truck companies' main arguments. According to respondents, the City "urge[s] that the initial saving clause contained in [§] (c)(2)(A) should be construed to *uphold* municipal authority to impose detailed licensing schemes on any category of motor carriers." Resp. 29 (emphasis added). But

that is not our position or the position of the United States. "[T]o construe the phrase 'authority of a State' in [§] 14501(c)(2)(A) to encompass delegations of power to municipal governments," as the United States helpfully explains (U.S. 17), "would not leave municipal regulation in the defined areas unconstrained by federal law. It simply means that the propriety of municipal regulation regarding those matters is to be determined by reference to other federal statutory provisions that specifically address preemption in the pertinent subject areas."

Both the text of the statute and its legislative history support this reading. As a matter of text, § (c)(2)(A) says "Paragraph (1)"—namely § (c)(1)—"shall not restrict" the authority of a "State" over certain subject matters, including safety. What States could do before 1994 in these enumerated areas, in other words, they could do after passage of the law—including delegating their power. The provision thus incorporates a comprehensive statutory scheme found elsewhere in Title 49 on these topics—for example, safety, 49 U.S.C. §§ 31131-31137, route controls for hazardous materials, §§ 5112-5125, size-based route controls, §§ 31111-31115, and minimum financial responsibility, §§ 31138-31139.

As a matter of legislative history, the Conference Report could not have been more clear. It explains that "nothing in [§ 14501(c)(2)(A)] amends other Federal statutes that govern the ability of States to impose safety requirements, hazardous materials routing matters, truck size and weight restrictions or financial responsibility requirements." H.R. Conf. Rep. No. 103-677, at 84 (1994). And it adds that the Act leaves state authority in these areas "unaffected," *id.*, and "unchanged," *id.* at 85. *See* Pet. 33-34; U.S. 17 & n.3.

Contrary to the view of respondents and of some courts of appeal, *see Stucky v. City of San Antonio*, 260 F.3d 424, 446 (5th Cir. 2001) ("under the City's argument there is no

stopping point for the potential reach of the safety exception"), the City's reading of § (c)(2)(A) does not "swallow up the express preemption Congress provided." Resp. 29. The section was not designed to create new inroads on preemption but simply to preserve the role of State and local governments, for better or worse, that already existed. One of respondents' *amici* accepts this view. *See* Cargo Airline Ass'n 9.

Second, this interpretation offers still another reason why the drafters of § (c)(2)(A) would have used only the word "State" in describing the areas of motor-carrier legislation left unaffected by the 1994 FAAA Act. The point of the provision was merely to identify the *subject matters* of motor-carrier legislation left unaffected by preemption, not to describe the *political bodies* that could legislate in the area. Anyone interested in determining the nuts and bolts of how States regulated in these enumerated areas would have to read the relevant sections of Title 49, which not only contemplate regulations by States *and* municipalities, *see* 49 U.S.C. §§ 31102(b)(1)(O), 31104(f), 31132(8), 31132(9), but also provide for DOT review of all such laws to ensure that they do not impose an undue burden on interstate commerce. Against this backdrop, it is difficult to maintain that this provision—which is entitled "Matters Not Covered" and says the preemption paragraph "shall not restrict" the "regulatory authority" of States on these specified topics—was designed to dictate the political bodies that may regulate in the area. One of respondents' *amici* attempts to counter this point (Towing and Recovery Ass'n 16) by pointing to 1995 and 1998 motor-carrier legislation subsequently codified in § 14501, but fails to explain why these later-enacted laws may tenably explain the meaning of this 1994 legislation, let alone do so through the most indirect of implications.

6. The tow-truck companies' interpretation causes more interpretive problems than it solves. Rather than embrace this sensible reading of the statute's terms and the modest role § (c)(2)(A) plays in preserving other directives of

Title 49, respondents raise a series of arguments that make reconciling this subsection with the rest of the Title virtually impossible—and hopelessly difficult to anticipate through the lens of this single case.

Hazardous materials. One such problem has been acknowledged. As respondents to their credit admit, their interpretation of § (c)(2)(A)—that States, but not their political subdivisions, may enact laws on the enumerated matters—cannot readily be reconciled with the provisions of Title 49 addressing hazardous-materials route regulations. For "the federal hazardous waste transportation laws," respondents concede (Resp. 45-46), "contemplate state *and* local regulation." *See* 49 U.S.C. §§ 5112(b)(1)(H)(i), 5125(d)(1). The only reconciliation available is to say that the later provision repealed by implication the earlier one. But the statute and legislative history make quite clear that this is exactly what the 1994 FAAA Act did not do. Repeals by implication, at all events, are highly disfavored and require far more specificity than the negative inferences that respondents invoke here. *See, e.g., Vonn*, 122 S. Ct. at 1050; *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986, 1017-18 (1984).

Safety. A similar problem exists in the area of safety. *See* Pet. 9-12. Before 1994, 60 years of federal legislation preserved the role of States (and cities) in regulating local "safety" issues. By referencing that subject in § (c)(2)(A), Congress perpetuated the continuing power of the States (and their cities) in this area as well as the continuing restrictions over them under other provisions of federal law. 49 U.S.C. §§ 31100, 31101, 31104, 31131-31137; 49 C.F.R. pt. 350, pt. 355. Respondents do not answer this point—except to offer (Resp. 12-13, 20 n.8, 44) a complex reading of the preemption provision by which it does not apply to general traffic laws. The multiplicity of interpretive steps required to accept this reading, however, stands in marked contrast to the straightforward construction offered by the City. Namely, § (c)(2)(A) merely incorporates the existing federal safety

laws, which contain a provision that addresses this point. Those laws provide, in a section entitled "Traffic regulation," that DOT may not "prescribe traffic regulations or preempt State traffic regulations." 49 U.S.C. § 31147(a).

But even if respondents were somehow correct—that the preemption provision by its terms does not cover general traffic laws—the preemption and safety provisions still would affect *some* laws applicable to motor carriers, and that raises the question whether § (c)(2)(A) meant suddenly to repeal the States' statutory authority to delegate safety police power to their political subdivisions. As to that, all respondents can do is mention the references to "political subdivisions" in other parts of the 1994 FAAA Act, which in their view partially repealed decades of cooperative national, state and local federalism in this area. Such a repeal by implication makes scant sense here not only because of the legitimate explanations for Congress's word choice but also because of later congressional directives. In 1998, Congress enacted § 31100, which declared that the purpose of the federal safety laws—*i.e.*, the laws referenced in the safety exception—is "to ensure that the Secretary, States, and other political jurisdictions work in partnership to establish programs to improve motor carrier, commercial motor vehicle, and driver safety to support a safe and efficient transportation system." 49 U.S.C. § 31100; *see also id.* §§ 31102(b)(1)(O); 31104(f).

Size and weight. Respondents next suggest (Resp. 38) that Congress signaled its desire to allow only state legislatures to enact size and weight routing provisions when it described the preserved power as "the authority of a State to impose *highway* route controls or limitations based on the size or weight of the motor vehicle." 49 U.S.C. § 14501(c)(2)(A) (emphasis added). Because the provision "only applies to *highway* route controls," respondents argue (Resp. 38), there is nothing odd about preserving state authority "on its highways," but not as to other roads within a State. Yet, for purposes of this section, "highway" means a "road, highway,

street, and way in a State," 49 U.S.C. § 13102(9), and thus covers all roads in a State, not just state highways. Far from signaling that only state legislatures could pass such laws, the definition of "highway" contemplates that size and weight controls on routes would be enacted at the state and local level—just as Congress had permitted before 1994 and just as it permits today. *See generally* 49 U.S.C. §§ 31111-31115; *see* 49 U.S.C. § 31114(b) ("This section does not prevent a State or local government from imposing reasonable [access] restrictions, based on safety considerations.").

Nor do respondents improve their position by arguing (Resp. 38) that the preemption provision "does not encompass general laws such as traffic laws." *All* weight and size restrictions on local roads, bridges, and tunnels presumably are generally applicable. It would make little sense to create a height restriction for a tunnel, a weight restriction for a bridge, or a size restriction for a narrow road applicable only to *some* vehicles. If, as respondents argue, the preemption provision does not apply to these types of local size and weight route restrictions, then this aspect of § (c)(2)(A) is surplusage.

Enact or enforce. Because the preemption provision bars state and local efforts to "enact or enforce" laws relating to the prices, routes or services of motor carriers, the City reasoned (Pet. 26-27) that respondents' interpretation would bar *any* local enforcement of state laws in these areas, creating a novel law-enforcement vacuum. Respondents disagree. To their eyes, the phrase "enact or enforce" was not meant to convey its traditional meaning—*e.g.*, "to establish by legal and authoritative act: make into a law" or "to put in force: cause to take effect." *See Webster's Third New Int'l Dictionary* 745, 751 (1968). Rather the words were designed "to incorporate the parallel concepts of creating new law and applying existing law." Resp. 36. But they offer no support, whether statutory or dictionary definitions, indicating that this is how Congress traditionally uses these terms. The cases they cite,

moreover, illustrate exactly how Congress would have drafted the law had it intended this meaning. *Id.* at 36 ("*See, e.g.*, *Geier*, 529 U.S. 861 ("establish, or to continue in effect" pertinent provisions; later amended to "prescribe or continue in effect"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) ("establish or continue in effect"); *Easterwood*, 507 U.S. 658 ("adopt or continue in force").). The linguistic gymnastics needed to reach their interpretation, moreover, turn on the very belt-and-suspenders draftsmanship that respondents elsewhere decry. If they are willing to tolerate the redundancy created by their construction of "enact or enforce"—"enact" by itself would normally suffice to bar all laws—it is difficult to understand why they are unwilling to tolerate the more justifiable redundancies created by the City's reading.

Nor does *American Airlines, Inc. v. Wolens* advance this interpretation. 513 U.S. 219 (1995). Not one of respondents' quotations from the opinion (Resp. 36) addresses, much less contradicts, the City's interpretation. And with good reason: At issue was whether a *private* citizen could *enforce* a private contract, not whether a governmental body could enforce a law. *Wolens* construed "enforce" to "connote[] official, government-imposed policies, not the terms of a private contract" and as "most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *Id.* at 229 n.5. That interpretation of "enforce" undermines rather than bolsters respondents' argument.

All that respondents ultimately have to support this limitation on "enforce" is an instinct, which the City shares: Congress could not possibly have meant to eliminate the traditional role of local law enforcement in enforcing state safety laws. But the more natural way to dignify that instinct and ultimately to respect Congress's stewardship over this area is to give "safety regulatory authority of a State" its traditional meaning. And that is all the more true when one considers the result of respondents' extensive labors—first to construe a *federal* statute to dictate that only *state legislatures*

may enact laws related only to *intrastate* commerce, then to enter a labyrinth of reconciliation problems regarding the meaning of § (c)(2)(A) relative to other matters in Title 49.

Mortier, it would seem, marks the more straightforward path. And in reaching its interpretation of "State," *Mortier* recognized what the City has asked the Court to recognize here—that one of the anomalous results of interpreting "State" to exclude political subdivisions is that it "would prohibit local enforcement authority altogether." 501 U.S. at 609.

7. The City's interpretation fully respects the deregulatory purpose of the 1994 FAAA Act. Respondents further claim (Resp. 33) that authorizing state and city safety regulations will undermine the deregulatory objective of the 1994 law and ultimately risk the creation of 39,000 different laws zig-zagging across the country. This is hyperbole and misconceives the way state governments work.

To begin, it is difficult to see why the deregulatory purpose of the 1994 FAAA Act, which covers *intrastate* motor carriers, requires this unusual divestiture of state power when the deregulatory purpose of the 1980 Motor Carrier Act, which covers *interstate* motor carriers, did not require a comparable divestiture of state power. Pet. 10-11. That inconsistency by itself undermines respondents' deregulatory-purpose argument.

Nothing about the City's position, moreover, precludes motor carriers from obtaining uniform laws from their state legislatures. Just as Congress may preempt state and local laws, state legislatures may preempt local laws within the State in a given area. The State of Ohio, for one, has already done just that—preempting some local motor carrier laws but allowing laws covering tow trucks. Ohio Rev. Code Ann. §§ 4921.02(A)(8), 4923.02(A)(10); *City of Cincinnati v. Reed*, 500 N.E.2d 333 (Ohio Ct. App. 1985). Uniform state laws in any of these areas, it turns out, may indeed be enacted by state

legislatures. Congress, however, did not make that choice for the States, but instead left it to them in the first instance.

For much the same reason that the City's interpretation still *permits* uniform safety and other laws within a State, respondents' state-law-only interpretation by no means *compels* uniformity in these areas. Even under respondents' interpretation, States still would be permitted to enact safety laws that differed in substance within the State depending on the region of the State or more likely the size of the city. Since Congress nowhere indicated that the state laws in these areas must be uniform throughout the State—something it assuredly would have done had uniformity been its goal—the threat of a hodgepodge of differing restrictions within each State remains even under respondents' interpretation.

8. Any remaining deregulatory concerns are removed by DOT's review authority over state and municipal laws in these areas. The final confirmation that the deregulatory function of the 1994 Act will not be side-tracked by the City's position is that DOT retains authority to review *interstate* and *intrastate* safety, routing and insurance requirements passed by States and cities. This extant authority not only shows that Congress expected that States and cities would enact laws in these areas, but it also deflates the risk of burdensome local regulations.

In arguing otherwise, respondents claim (Resp. 44) that DOT's review authority does not apply here because it does "not govern state and local regulations that target specific segments of the motor carrier industry, such as motor carriers of property or tow truck operators." Not true. Congress gave DOT review authority over all "laws or regulations on commercial motor vehicle safety." 49 U.S.C. § 31141(c). *See also* 49 U.S.C. §§ 31101(1), 31104(h). And the applicable regulations reach the same conclusion. 49 C.F.R. § 355.3; 49 C.F.R. § 350.335(d). Respondents have no tenable support for their contrary argument. They offer no statutory citations

and initially rely on just one regulation, *id.* § 350.333(a). That regulation, however, addresses "guidelines for the compatibility review" of state and municipal laws by DOT, *id.*, then explains the standards for determining whether a state or local ordinance is compatible, incompatible or incompatible but within an exemption provided by DOT. This particular regulation, and the only other one cited (*id.* § 355.25(a)), plainly demonstrate that DOT *may* review state and local laws in this area.

9. The agency's views warrant *Chevron* deference in some instances and *Skidmore* respect in others. As the above suggests, no one is asking for *Chevron* deference with respect to the Secretary's interpretation of § 14501(c)(2)(A). That deference is owed, however, to the agency's interpretation of other provisions of Title 49—interpretations that answer respondents' deregulatory concerns, that demonstrate where this provision falls in the overall statutory scheme and that illustrate a series of reconciliation problems with adopting respondents' interpretation. As for the interpretive letters, one can only admire those who do not find them helpful in deciphering this intricate and interwoven statutory scheme. As the Court recently concluded in addressing an equally-complex statutory scheme—the Medicaid laws—*Skidmore* deference and the "respectful consideration" that comes with it remain appropriate for interpretive letters. *Wis. Dep't of Health & Family Serv. v. Blumer*, 122 S. Ct. 962, 976 (2002).

10. The post-1994 enactments do not alter this interpretation. Also unavailing is respondents' heavy reliance on later laws that Congress enacted in this area—principally the 1995 legislation regarding the authority of States and cities to set the prices of non-consensual tows. *See* 49 U.S.C. § 14501(c)(2)(C). For one, the claimed inference is not a legitimate one. Respondents, recall, do not argue that the 1995 legislation addresses and answers what

"safety regulatory authority of a State" means. They instead try to draw additional inferences from the fact that Congress specified that "political subdivisions" could regulate the prices of their own tows. Instead of modifying § (c)(2)(A) in such an indirect and untimely way, the word choice of the later legislation has more basic explanations. The topic of "prices" is covered specifically in the preemption provision, unlike the "Matters Not Covered" in § (c)(2)(A); it is not a topic that was elsewhere regulated in Title 49 and thus could not have incorporated by reference to those other provisions; and cities at all events are generally the only political bodies that ever will hire towing services. These explanations for mentioning "political subdivisions" by name alone defeat respondents' argument, and they alone suffice to avoid the implication (built upon earlier implications) that Congress in 1995 meant to alter the meaning of § (c)(2)(A).

No less importantly, respondents fail to answer the City's argument (Pet. 25) that later legislation represents a slim reed upon which to rely in construing the handiwork of an earlier legislature. While they say (Resp. 39) that in looking at the context in which a provision appears, the Court has "regularly and correctly applied [this interpretive aid] without regard to when the different components of a statute were first enacted," the three cited cases say no such thing. They thus did not, as respondents request here, decide the meaning of a provision based solely upon inferences drawn from the diction of a later-enacted statute.

Nor, contrary to respondents' suggestion (Resp. 28 n.15), does the fact that the 1995 Act came just one year after the 1994 Act create an exception to this rule. While only one year separated the two laws, that year was hardly an inconsequential one. Not only was a different Congress in power at each time, but the difference between the 103rd Congress and the 104th Congress was the 1994 election, which altered control of the House and by any standard was an important election (even if it did not turn on tow-truck policy).

11. The Airline Deregulation Act (ADA) cases do not help respondents. The two ADA cases upon which respondents rely (Resp. 11-13)—*Morales* and *Wolens*—have little bearing on this case. Because the 1978 ADA, which was addressed in those cases, did not contain any safety exception comparable to § (c)(2)(A), it is difficult to see the relevance of respondents' lengthy discussion of these cases.

The 1978 ADA, however, does offer one insight. That the 1978 ADA contained a preemption provision and did not have a comparable "Matters Not Covered" section (because States and cities had no authority then to regulate airline safety) offers one more explanation why respondents' negative inferences are inappropriate. The drafters of the 1994 FAAA Act were pulling together two strains of legislation with two different pedigrees. At the same time that they borrowed the economic-preemption language from the 1978 ADA, they needed to preserve the safety-authority regulations of the motor-carriers laws. The distinct heritage of each provision goes a long way to explaining the inelegance of the statute and to countering the argument that negative inferences should be drawn from the different provisions.

12. The teachings of *Mortier* remain instructive here. In one respect, the City agrees with respondents' discussion of *Mortier*. Even though the case involved a similar preservation of "State" power, a similar definition of "State" that did not include cities, 501 U.S. at 606, and similar references by name to "political subdivisions," *id.* at 608, respondents are correct that all cases ultimately require a careful dissection of the statutory provisions at issue. But, in this instance, that analysis shows *Mortier* to be the harder case. Unlike this statutory scheme, the state-law-only argument raised in *Mortier* did not present nearly as many implementation and repeal-by-implication problems as the interpretation raised here.

Respondents also attempt to distinguish *Mortier* on the ground (Resp. 21) that "Congress *had not provided* for express preemption or field preemption in FIFRA, and there was no basis for finding implied preemption under the circumstances." But this view ignores the Court's alternative holding. After concluding that Congress did not intend FIFRA to preempt state and local law, the Court observed that, even had preemption been found, local regulation would be precluded only if it could "be shown under ordinary canons of construction that FIFRA's delegation of authority to 'State[s]' would not therefore allow the States in turn to redelegate some of this authority." 501 U.S. at 612. And under "ordinary canons of construction," the Court concluded, FIFRA "can be plausibly read to contemplate precisely such redelegation. The term 'State' is not self-limiting since political subdivisions are merely subordinate components of the whole." *Id.*

Neither does *Mortier* stand as a precedent limited to FIFRA and to it alone. Respondents and their *amici* never dispute these enduring lessons from the case: it is a "well settled" principle that "local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," 501 U.S. at 607-08 (internal citation omitted); "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers," *id.* at 608; and Congress's grant of authority to the "State[s]" left "the allocation of regulatory authority to the 'absolute discretion' of the States themselves," *id.* at 607-08. These lessons are instructive here.

13. The clear-statement rule applies. Far from implicating a contentious debate about the separation of national powers, this case represents a model of cooperative federalism. The United States relies on *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), to explain (U.S. 15-16) that any

power Congress has "to prohibit the delegation of state regulatory authority to municipalities" is "especially anomalous" and accordingly "should not lightly be imputed to Congress." And the City agrees that Congress permissibly gave the DOT authority to review interstate *and* intrastate safety laws enacted by cities and States. Whether one considers the interpretation advanced by respondents to invade the States' sovereignty, as the State *amici* brief does, (Kansas 7-11), or to fall within the outer edges of Congress's power, as the United States does (U.S. 16 n.2), there is little room for doubt that this is not the way Congress usually legislates. It is one thing to preempt a subject of State law; it is quite another to preempt the State governmental process for addressing the subject. That oddity by itself justifies application of *Gregory* and the Court's other clear-statement cases. *See, e.g., United States v. Bass*, 404 U.S. 336 (1971).

Instead of answering this question by pointing to other cases in which the Court has allowed Congress casually to dictate the political methods of state regulation or by pointing to other federal statutes that purport to do the same thing, respondents argue (Resp. 47-50) that several common-law preemption cases intimate that this form of legislation is not unusual. In a few of these cases, respondents note, the Court held that the federal statute preempted state statutes and regulations but not state common-law claims presented to juries, thereby purporting to limit state processes of governing. But all state tort actions ultimately stem from state legislative authorization, whether by laws creating the duty at issue or by laws authorizing the claim in court. *See Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991); *see, e.g.*, Cal. Civ. Code § 22.2 (West 2002); Colo. Rev. Stat. Ann. § 2-4-211 (West 2001); Fla. Stat. Ann. § 2.01 (West 2001); Neb. Rev. Stat. Ann. § 49-101 (Michie 2001). No less importantly, in each of these laws, Congress did not purport to regulate the processes of state government, but rather a category of preempted private activity. *See*

Medtronic, 518 U.S. at 502 (requirements "escape pre-emption, not because the source of the duty is a judge-made common law rule, but rather because their generality leaves them outside the category of requirements that [the statute preempts]"); *Wolens*, 513 U.S. at 228 ("We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airlines alleged breach of its own self-imposed undertakings."). These cases thus all fall on the traditional side of the line, turning on the substance of the regulated area, not on the political bodies given authority there.

Also flawed is the claim (Resp. 49-50) that Congress's greater power to preempt the entire area of interstate transportation includes the lesser power to dictate the state legislative processes for regulating there. For much the same reason that the Court has rejected this theory in the context of unconstitutional conditions, it should reject the theory here. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Congress has no more right to condition a State's regulation of transportation on the promise that it suppress speech in the State than it does to require the State to abandon other constitutional guarantees as a condition of regulating transportation. But the Court need not reach this issue. The construction of the statute offered by the City and United States avoids this perplexing constitutional question, supplying one more reason for embracing their position.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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